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No. 83-880

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RAYMOND JOHNSON,
Defendant-Appellant,

vs.

JEFF SCHERMERHORN and PERRY SCHERMERHORN,

Plaintiffs-Appellees.

MOTION TO DISMISS APPEAL

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Appellees move the Court for an order dismissing the appeal of Appellant Raymond Johnson, pursuant to U.S. Sup. Ct. Rule 16. This motion is based upon all documents of record and the following Argument.

ARGUMENT

Appellant argues that the United States Supreme Court has jurisdiction to consider this appeal at this juncture pursuant to 28 U.S.C.A. §1257(2). To be eligible for review under that section, the decision appealed from must be in the category of "Final judgments or decrees rendered by the highest court of a State in which a decision could be had...". 28 U.S.C.A. §1257.

The decision appealed from in this case is the Minnesota Supreme Court's affirmation of the trial court's denial of Appellant's motion for dismissal. Appellant's unsuccessful motion alleged lack of jurisdiction over the person of Appellant.

Appellant contends that at the trial court level, Appellees failed to make a prima facie showing of sufficient jurisdictional facts. This contention is totally erroneous, as indicated by the opinion of the Minnesota Supreme Court, wherein is found the following:

> "...in the present posture of this case, defendant-appellant Johnson has the requisite "minimum contacts" with Minnesota to afford personal jurisdiction over him under our long arm statute. "It is clear that in reviewing the granting of motions [to dismiss] founded upon Rule 12(b), Federal Rules of Civil Procedure, the model for our Rule 12.02, allegations in the complaint must be taken as true." Hunt v. Nevada State Bank, 285 Minn. 77, 82, 172 N.W.2d 292, 296 (1969); see also Marquette National Bank of Minneapolis v. Norris, 270 N.W.2d 290 (Minn. 1978). In other words, at this juncture, we take as true that defendant Raymond Johnson was a co-owner of the plane with defendant

> Loren Nogosek, who at relevant times was a Minnesota resident, and that the negotiations for the sale of the airplane to Minnesota plaintiffs were initiated by defendant Johnson's co-owner in Minnesota. This case is unlike the car dealer in World-Wide Volkswagen who indiscriminately sells cars that are likely to find their way to any place in the country. Here the plaintiffs have alleged facts that, if true, show that defendant Johnson purposely availed himself, through his co-owner, of the privilege of conducting activities within Minnesota. It may be that at trial plaintiffs will not be able to prove their allegations of the requisite minimal contacts with Minnesota, but they must be given that opportunity; the trial court was correct in denying the motion to dismiss.
> Affirmed."

Appellant has offered no authority or convincing argument that the State Courts were wrong in taking as true the allegations of the complaint for purposes of ruling on appellant's motion.

It should be noted that Appellant was apparently satisfied with allowing the trial court to use that approach, for they did not seek an evidentiary hearing involving testimony. At such a hearing the court could have considered the veracity of the witnesses making the allegations. Instead, Appellant merely submitted an affidavit which amounted to a simple denial of the allegations of Appellee's complaint. The information provided by Appellant was not sufficient to establish that Appellee's complaint was inherently incredible. Under these circumstances, Appellant must be deemed to have waived any objection to the state courts' method of decision- making, and the findings of the state courts must not be disturbed.

The United States Supreme Court has previously stated that denial of motions such as Appellant's are not immediately reviewable. In Catlin v. United States, the Court stated:

> "But denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable. (cites omitted). Certainly this is true whenever the question may be saved for disposition upon review of final judgment disposing of all issues involved in the litigation or in some other adequate manner."

Catlin v. United States, 324 U.S. 229, 236, 65 S.Ct. 631, 635. The reason for the rule is to eliminate piecemeal litigation, conserve judicial resources, and eliminate delays caused by interlocutory appeals. Id.

Critical to any discussion of the doctrine of due process is the question

of fairness of actions proposed or taken. Appellant argued, to the satisfaction of the Minnesota Supreme Court, that trial convenience is not a "contact" with the proposed forum. However, to expand upon the decision of the trial court, the bur den imposed upon Appellant in proceeding to trial in the neighboring State of Minnesota is not nearly so great as the burden, imposed upon Appellees and the other parties awaiting the outcome of protracted appeals, from interlocutory orders. The alternative of requiring Appellees to institute a separate action in North Dakota against only Appellant would result in even greater expense and inconvenience to the parties, would be a waste of judicial resources, and would lead to the undesirable possibility of

inconsistent verdicts in the separate jurisdictions.

The decision of the Minnesota Supreme Court is not final within the context of 28 U.S.C.A. §1257. It is clear from reading that Court's opinion that appellees must bear the burden of proving their allegations at trial. If appellant feels that appellees have not met that burden of proof at trial, he could renew his motion to dismiss at that time.

Conclusion

The decision appealed from is not a final judgment or decree, and thus should not be appealable under 28 U.S.C.A. §1257. Appellant has not shown that his opportunity for meaningful review will be denied unless he is permitted immediate review. Allowing the appeal to

proceed at this time will result in increased expense and inconvenience to all of the parties, will overtax judicial resources, and will unnecessarily delay resolution of claims. On the other hand, dismissing this appeal will not result in substantial unfairness to Appellant. This appeal should be dismissed.

Respectfully submitted,

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